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No. 97-1638

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID RENDEL AND RACHEL RENDEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether taxpayers who receive a mistaken tax refund and thereafter repay that amount (plus interest) to the Treasury are entitled to obtain a "refund" of their payment when they acknowledge that they in fact owed the amount in question and their repayment occurred during the period in which the United States could have made an assessment of the amount repaid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Badaracco v. *Commissioner*, 464 U.S. 386 (1984)	6
Bilzerian v. *United States*, 86 F.3d 1067 (11th Cir. 1996)	5
Black Prince Distillery, Inc. v. *United States*, 586 F. Supp. 1169 (D.N.J. 1984)	5
Bowers v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (1927)	4
Brookhurst, Inc. v. *United States*, 931 F.2d 554 (9th Cir.), cert. denied, 502 U.S. 907 (1991)	5
Clark v. *United States*, 63 F.3d 83 (1st Cir. 1995)	5
Crompton & Knowles Loom Works v. *White*, 65 F.2d 132 (1st Cir.), cert. denied, 290 U.S. 669 (1933)	3-4
Ewing v. *United States*, 914 F.2d 499 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991)	3
Goldstein, Baron & Lewis, Chartered v. *United States*, 995 F.2d 35 (4th Cir. 1993), cert. denied, 510 U.S. 1041 (1994)	6
Ideal Realty Co. v. *United States*, 561 F.2d 1123 (4th Cir. 1977)	5
Jones v. *Liberty Glass Co.*, 332 U.S. 524 (1947)	3
Lewis v. *Reynolds*, 284 U.S. 281, modified, 284 U.S. 599 (1932)	3, 4

Cases—Continued: Page

O'Bryant v. *United States*, 49 F.3d 340 (7th Cir. 1995) 5

Scholz v. *United States*, 773 F.2d 709 (6th Cir. 1985) 5

United States v. *Wilkes*, 946 F.2d 1143 (5th Cir. 1991) 5

Warner v. *Commissioner*, 526 F.2d 1 (9th Cir. 1975) 5

Statutes:

Internal Revenue Code (26 U.S.C.):

§ 6401(a) 3

§ 6501(c)(1) 6

§ 7405 4-5

Miscellanous:

Rev. Rul. 85-67, 1985-1 C.B. 364 4

S. Rep. No. 960, 70th Cong., 1st Sess. (1928) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported, but the decision is noted at 124 F.3d 127 (Table). The opinion of the district court (Pet. App. 3a-8a) is unofficially reported at 79 A.F.T.R. 2d 97-499.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1997. The petition for rehearing was denied on January 6, 1998 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed a timely income tax return for 1984. In April 1991, petitioners were indicted for conspiring to defraud the United States and for evading income tax in their 1984 tax year. In October 1991, petitioners pled guilty to income tax evasion. In connection with their pleas, petitioners sent the government an advance payment of $113,057 towards their anticipated tax liability for 1984 and an advance payment of $20,153 towards their anticipated tax liability for 1985 (Pet. App. 3a-4a).

On July 12, 1993, the Internal Revenue Service assessed a liability of $113,057 for 1984 for petitioners and credited their advance payment of $113,057 against the assessment. On the same day, however, the IRS mistakenly attributed a withholding credit of $113,057 to petitioners' account. The IRS also issued a refund check to petitioners for $127,065 on that date, representing $113,057 plus interest of $14,008 (Pet. App. 4a).

On April 17, 1995, the IRS discovered that it had made an erroneous refund. In notices sent to petitioners on that date and again on June 19, 1995, the IRS demanded that petitioners pay the amount of the erroneous refund, plus interest of $114,096, for a total of $241,162. On July 17, 1995, petitioners paid the IRS $242,200. On September 5, 1995, however, they filed a claim for refund of that amount. When the IRS did not grant the requested refund, petitioners brought this refund suit in district court (Pet. App. 4a).

2. The district court granted summary judgment to the United States. The court concluded that, because petitioners had not overpaid their 1984 taxes,

they had no cause of action for a refund of an overpayment (Pet. App. 8a).

3. The court of appeals affirmed (Pet. App. 1a-2a). Relying on this Court's decision in *Lewis* v. *Reynolds*, 284 U.S. 281 (1932), the court of appeals concluded that the government may properly retain the money voluntarily paid to it, "because it did not exceed the amount of [petitioners'] tax liability" (Pet. App. 2a).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that petitioners were not entitled to a tax refund. A suit for refund of a tax overpayment may be brought only when the United States has collected more money from the taxpayer than it had a right to receive. See *Lewis* v. *Reynolds*, 284 U.S. 281, modified, 284 U.S. 599 (1932). For a taxpayer to prevail in a refund suit, he must establish that he made an "overpayment" of the taxes that he owed—that is, a "payment in excess of that which is properly due." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531 (1947). A tax collected after the applicable period of limitations has expired constitutes an overpayment because the tax is not then lawfully due. See 26 U.S.C. 6401(a); *Ewing* v. *United States*, 914 F.2d 499, 504 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991). When a payment of taxes owed by the taxpayer is made within the statutory period for assessment, however, that payment is not an overpayment merely because a formal assessment had not then been made. 914 F.2d at 504 n.13. See also *Crompton & Knowles Loom Works* v. *White*, 65 F.2d

132 (1st Cir.), cert. denied, 290 U.S. 669 (1933); Rev. Rul. 85-67, 1985-1 C.B. 364 ("[w]here taxes and interest legally due have been paid before the expiration of the period of limitations for assessment * * *, they cannot be recovered by the taxpayer merely because they have not been formally assessed"). As this Court stated in *Lewis* v. *Reynolds*, 284 U.S. at 283:

> An overpayment must appear before a refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

In the present case, petitioners do not dispute that they owed the amount of taxes and interest that they paid and for which they now seek a refund. Nor do they dispute that the statute of limitations for assessment of the taxes and interest thus paid had not expired at the time of the payment. Under the consistent holdings of this Court and of the courts of appeals, the requested refund was therefore properly denied (Pet. App. 1a-2a).

2. Petitioners err in contending (Pet. 9) that the decision in this case conflicts with *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (1927). In *Bowers*, this Court concluded that the government may not retain amounts collected after the statute of limitations on collection had expired. *Id.* at 351. Petitioners point out that the statute of limitations for the commencement of a suit by the United States to recover an erroneous tax refund under 26 U.S.C.

7405 had expired before petitioners paid the amounts at issue in this case (Pet. 9-10). The flaw in petitioners' position, however, is that a suit under 26 U.S.C. 7405 is not the *only* remedy available to the government to recover an erroneous tax refund. Instead, as the courts have consistently held, when the statute of limitations for assessing the original tax liability has not expired, the tax for which an erroneous refund was made can be recovered by assessment and collection of the tax in the ordinary manner.* See, *e.g.*, *Brookhurst, Inc.* v. *United States*, 931 F.2d 554, 557 (9th Cir.), cert. denied, 502 U.S. 907 (1991); *Scholz* v. *United States*, 773 F.2d 709, 710 (6th Cir. 1985); *Ideal Realty Co.* v. *United States*, 561 F.2d 1123, 1125 (4th Cir. 1977) (per curiam); *Warner* v. *Commissioner*, 526 F.2d 1, 2 (9th Cir. 1975). See also *Black Prince Distillery, Inc.* v. *United States*, 586 F. Supp. 1169, 1172-1174 (D.N.J. 1984).

Indeed, the very cases on which petitioners rely (Pet. 14-15) make this very point. See, *e.g.*, *Bilzerian* v. *United States*, 86 F.3d 1067, 1069 (11th Cir. 1996) (IRS may collect an erroneous refund in a statutory refund suit under Section 7405 *or* by assessment made within period for assessment); *Clark* v. *United States*, 63 F.3d 83, 88 (1st Cir. 1995) (same); *United States* v. *Wilkes*, 946 F.2d 1143, 1152 (5th Cir. 1991) (same). See also *O'Bryant* v. *United States*, 49 F.3d 340, 346 (7th Cir. 1995).

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* The legislative history of 26 U.S.C. 7405 reflects that, in addition to the statutory refund suit provided in the Code, "if the limitation period on the making of assessments has not expired, the erroneous refund may be recovered by assessment in the ordinary manner." S. Rep. No. 960, 70th Cong., 1st Sess. 42 (1928).

As petitioners acknowledge (Pet. 10 n.2), because they filed a fraudulent tax return for 1984, the statute of limitations on assessment of their 1984 tax had not expired before the tax was ultimately paid in this case. See 26 U.S.C. 6501(c)(1); *Badaracco* v. *Commissioner*, 464 U.S. 386, 392 (1984). Because the statute of limitations on assessment remained open, it was proper for the United States to retain the amount received from petitioners under the consistent decisions described above. Indeed, the situation in the present case is indistinguishable from *Goldstein, Baron & Lewis, Chartered* v. *United States*, 995 F.2d 35 (4th Cir. 1993), cert. denied, 510 U.S. 1041 (1994). In that case, the IRS made an erroneous refund and did not seek to collect the debt by an erroneous refund action. Instead, the IRS sent a demand for payment to the taxpayer *after* the statute of limitations had expired for an erroneous refund suit but *before* the statute of limitations had expired for assessment of the tax. After receiving the demand, the taxpayer repaid the money "under protest." The taxpayer then brought suit to recover the amount it had paid. The court rejected the taxpayer's claim, noting that the taxpayer had acknowledged that it owed a legitimate debt to the government at the time the money was paid. 995 F.2d at 36-37. There is thus no conflict among the circuits or other reason to warrant further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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